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In The

Supreme Court of the United States

October Term, 1989

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,

Petitioners,

v.

ROBERT HARMON, Director of the Missouri Department of Health, and DONALD LAMKINS, Administrator of the Missouri Rehabilitation Center at Mount Vernon,

Respondents.

v.

THAD C. McCANSE, Guardian Ad Litem,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Missouri

BRIEF FOR RESPONDENTS HARMON AND LAMKINS

WILLIAM L. WEBSTER
Attorney General

ROBERT L. PRESSON *
Assistant Attorney General

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8784

ROBERT NORTHCUTT
General Counsel
Missouri Department of Health
1738 E. Elm Street
Jefferson City, Missouri 65101

* Attorney of Record

Attorneys for Respondents Harmon and Lamkins

October 16, 1989

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QUESTION PRESENTED

Does the United States Constitution require states to authorize a court appointed guardian to cause the death of an incompetent and dependent ward of the state by denying the ward food and water when she is not terminally ill and there is no clear and convincing evidence of her intent?

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OTHER AUTHORITIES:

Donald L. Beschle, "Autonomous Decision-Making and Social Choice: Examining the 'Right to Die' ", 77 Kentucky Law Journal 319 (1988) 34, 41

Lindman & McIntyre, "The Medically Disabled and the Law" (Univ. of Chicago Press, 1961) 27

Nowak, Rotunda & Young, "Treatise on Constitutional Law", Vol. 2, pp. 606-607 (1986) 20

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Laurence H. Tribe, "American Constitutional Law", § 15-11 (1988) 13, 15, 18, 24, 41

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COUNTER STATEMENT OF THE CASE

In the early morning hours of January 11, 1983, Nancy Cruzan was involved in a single car automobile accident in Jasper County, Missouri. At the time of her initial hospital admission, she was totally nonresponsive, with no reflexes and no responses to pain (Tr. 27-49, 94-95, 108-109).

During Nancy Cruzan's six week stay at the Freeman Hospital, rehabilitation efforts were undertaken in which she was fed orally and during this time she was able to drink a glass of juice and eat foods, including mashed potatoes, bananas, poached eggs and link sausage (Tr. 281-285). The therapy reports indicated that she was chewing better and "eating whatever was put in her mouth." (Tr. 284). She was reported to become more responsive during this period in that she began to moan in response to painful stimuli, responded to auditory and olfactory stimuli and generally seemed more aware of her surroundings. She also began to move her limbs spontaneously and to hold her head up for longer periods of time (Tr. 281-285). The doctor in charge of her rehabilitation, however, testified that she was making no progress and discharged her (Tr. 287). During this period of time, a gastrostomy tube was surgically inserted into her stomach for feeding purposes. It was felt that feeding through the tube was safer, avoided the risk of aspiration and made her long term care easier (Tr. 111, 423). Some PVS patients are fed orally (Tr. 110, 164).

After stays in other hospitals as well as home settings, Ms. Cruzan was admitted to the State Rehabilitation Center in Mount Vernon in October of 1983. She has

remained at the Rehabilitation Center since that time and the cost of her care has been borne through state funds and Medicaid. While at the Rehabilitation Center, she has received standard nursing care which includes bathing, turning, passive range of motion, and hygienic and sanitary care (Tr. 614-616). Although the nursing care has been described as excellent, it is not extraordinary and there is nothing about it that requires that it be done in a hospital setting (Tr. 684, 771-772). Ms. Cruzan continues to receive her nutrition and hydration, plus minimal amounts of medication, through the gastrostomy tube. The process of feeding through the tube is not complex and requires only a few minutes to accomplish. The tube feeding presents no substantial risks to her health (Tr. 111, 691). Despite the fact that Ms. Cruzan does not require hospitalization, her family has resisted suggestions of transfer to a nursing home on the basis that the quality of her care would not be as good in such a setting (Tr. 352).

According to the testimony of Dr. Ronald Cranford, Ms. Cruzan is in a persistent vegetative state (PVS) in which she has sleep-wake cycles during which her eyes are open and move. According to Dr. Cranford, the most important characteristic of PVS is that the patient exhibits no voluntary interaction with the environment. Her condition is distinguished from a comatose state in which a patient is totally nonresponsive to the environment (Tr. 125-126). However, Dr. James Dexter concluded that although Ms. Cruzan was severely impaired, she was not in a PVS because she is sensitive to and responds, if only limitedly, to her environment (Tr. 764). Even Dr. Cranford admitted that Ms. Cruzan was more responsive than

other PVS patients. These anomalies included the fact that her eyes were open far more often and moved far more than most such patients. He acknowledged that certain of her reactions involved operation of some of the lower hemispheres of the brain in addition to the brain stem (Tr. 147).

The observations of the nursing staff at the Rehabilitation Center indicate that when an individual speaks to her, she responds by turning towards that individual (Tr. 594, 642). The staff has observed that she is more responsive to some individuals than to others, particularly the ones who spend more time with her (Tr. 595, 646). If she is touched by an individual prior to that person speaking she will generally tense up, while if the individual speaks to her before touching she does not have that reaction (Tr. 603). Ms. Cruzan also grimaces and moans in response to appropriate painful stimuli such as the movement of her extremities during range of motion exercises and her menstrual cycle. The nursing staff generally administers Tylenol which relieves the discomfort (Tr. 331-332, 618, 643, 685, 799). On several occasions the staff has observed her to cry such as when a Valentine's Day card was read to her and shortly after visits of her family (Tr. 596, 644). Dr. Cranford concluded that all of the responses exhibited by Ms. Cruzan were mere reflex which were fully consistent with PVS, while Dr. Dexter concluded that she was too responsive to be considered in a PVS.

It was agreed by all the physician witnesses that Ms. Cruzan did not meet any standard definition of death, including brain death (Tr. 221). In addition, her general health is good and she was not suffering from any disease

or condition which might be considered terminal (Tr. 99, 161, 328, 818).

Shortly after her admission to the Rehabilitation Center, Ms. Cruzan's parents were appointed her legal guardians (Tr. 435). On October 23, 1987, they filed a petition with the Probate Court of Jasper County, Missouri, seeking a declaration that they, as guardians, had the authority to request that nutrition and hydration be withdrawn, based upon Ms. Cruzan's right to refuse medical treatment, under either the common law or the United States Constitution.

During the course of a three day hearing held in March of 1988, her parents testified that Ms. Cruzan would not want to be maintained in her present condition and that she would wish nutrition and hydration to be withdrawn (Tr. 444, 520). However, both acknowledged that they had not had any conversations with their daughter about the withdrawal of medical care or treatment or about euthanasia (Tr. 451, 527). Similar opinion testimony, not based upon any specific statements of Ms. Cruzan, was offered by a cousin and a friend (Tr. 562, 580). However, another friend of Ms. Cruzan's testified that, in her opinion, while Ms. Cruzan would not want to be sustained at any cost, she did not believe Ms. Cruzan would agree with the withdrawal of nutrition and hydration (Tr. 590).

One of Ms. Cruzan's sisters, Christy White, testified to two separate conversations that she had had with her. The first occurred in September of 1981 and was occasioned by the stillbirth of their sister Donna's baby who had been born with a deformed foot and possibly other

impairments (Tr. 536). During the course of this conversation, Ms. Cruzan stated that maybe it was a greater kindness for the baby to be stillborn, rather than to have mere existence (Tr. 537). The second conversation was approximately a month later and was occasioned by the recent death of their grandmother (Tr. 538). Their grandmother had been in her seventies, with a pacemaker and was experiencing a great deal of pain while hospitalized (Tr. 539). During this second conversation, Ms. Cruzan indicated that she felt death might have been in their grandmother's best interests (Tr. 541). In neither of these conversations, however, did Ms. Cruzan express an opinion that medical care or other treatment should have been withheld (Tr. 551). In December of 1981, over a year before her accident, Ms. Cruzan had a conversation with another friend whose sister had died some months previously (Tr. 389). The friend's sister, if she had survived, would have been in a PVS. During the conversation, Ms. Cruzan stated that she would never want to live that way because if she could not be normal and do things for herself she would not want to live (Tr. 388-389). However, this conversation did not include any statement by Ms. Cruzan regarding the discontinuation of medical care or treatment or euthanasia (Tr. 402).

As to the actual withdrawal of nutrition and hydration, Dr. Cranford testified that it would be his recommendation not to actually remove the feeding tube but to simply cease providing nutrition while at the same time continuing to use the tube to provide anticonvulsant medication and minimal fluids (Tr. 489-490). Medical opinion on the effect of this procedure was divided. Some testified that Ms. Cruzan would feel no pain (Tr. 100-101,

170, 276), while others testified that Ms. Cruzan would experience pain and discomfort (Tr. 729-730, 774).

The Probate Court found that "in somewhat serious conversation" with a friend, Ms. Cruzan expressed the thought "that if sick or injured she would not wish to continue her life unless she could live at least half way normally." The court found that this evidence "suggests that given her present condition she would not wish to continue on with her nutrition and hydration." Pet.App., pp. A97-A98.

The Probate Court concluded that Ms. Cruzan's right to liberty under the United States Constitution included the right to refuse nutrition and hydration. Pet.App., p. A99. The court also found that to deny her guardians the authority to act in this instance would deprive Ms. Cruzan of equal protection of the law. The court, therefore, authorized, but did not require, the guardians to request the withdrawal of nutrition and hydration.

The decision of the Probate Court was reversed by the Supreme Court of Missouri. According to the Supreme Court, the common law recognizes the right of individual autonomy over decisions relating to one's health and welfare and that this includes the right to refuse medical treatment as well as to consent to it. Pet.App., p. A20. The Missouri Supreme Court expressed "grave doubts" as to whether the federal right of privacy was applicable "to decisions to terminate the provision of food and water to an incompetent patient." Pet.App., pp. A24-A25. Even if such a right were to be recognized, the Court did not believe that a decision by Ms. Cruzan's

guardians to withdraw food and water would be justified. Pet.App., p. A25.

The Missouri Supreme Court held that the right to refuse treatment, whether based upon common law or constitutional law, was not absolute and must be balanced against the state interest in preserving life. The key elements of the decision are: (1) that the probate court, rather than the guardians, must decide whether treatment should be terminated and (2) that such a decision must be based upon clear and convincing evidence that the incompetent patient had made such a choice or that termination is in the patient's best interests because treatment would be unduly burdensome. Since the evidence failed to meet this standard, termination of nutrition and hydration was not appropriate.

Because the parties are in such strong disagreement as to the substance of the Missouri Supreme Court's opinion, a fuller discussion thereof appears in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

I.

The petitioners' position seeks to have this Court engage in unnecessary or overbroad formulation of a constitutional rule. A major "issue" pressed by the petitioners, whether the decision to refuse medical treatment is constitutionally protected, is not properly before this Court because it is not presented by the specific facts of the case and there are alternative bases for ruling.

The Missouri Supreme Court concluded that the common law provided a right to refuse medical treatment. The court placed no categorical limits on that right, i.e. it did not rule out the possibility of terminating any particular type of medical care. This case is unlike the abortion cases because no particular medical treatment has been barred by the state. Cf. *Roe v. Wade*, 410 U.S. 113 (1973). Thus, assuming arguendo that the right to refuse medical treatment is constitutionally based, the common law right recognized by the Court below is co-extensive with it.

As to a liberty interest based upon bodily integrity, it is undisputed that a person may consent to such intrusion. Cases such as *Rochin v. California*, 342 U.S. 165 (1952) dealt with whether the state could, over the person's objection, force them to submit to an invasive procedure.

Whether viewed from the perspective of freedom of choice under the right of privacy or consent to bodily intrusion, it is clear that a totally incompetent person cannot make these choices or give valid consent. This is not to say that an incompetent person loses their constitutional rights. What they have lost is the ability to exercise those rights. Nancy Cruzan's loss of the ability to exercise her rights is the result of natural events and not a state deprivation. The undeniable fact of her incompetency is most appropriately viewed as an obstacle to the exercise of rights we may presume she still possesses. A state, however, is not constitutionally obligated to overcome such naturally occurring obstacles to an individual's liberty interests. *Webster v. Reproductive Health Services, et al.*, 109 S.Ct. 3040 (1989).

II.

The true issues presented by this case are not substantive but procedural: who is to make decisions on behalf of the incompetent and upon what basis may they act. Consideration of these procedural aspects may provide an additional basis for avoiding a substantive constitutional decision, if the procedures would comport with any asserted substantive right. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). Even if the common law right to refuse treatment is viewed as a state created liberty interest, the procedures do not constitute an unconstitutional denial or infringement thereof.

The Missouri Supreme Court concluded that under state law, a guardian was not authorized to make the extraordinary decision to terminate treatment. Such a decision could only be made by an appropriate court. This allocation of decision-making authority derives from the long-standing tradition of a state's *parens patriae* authority as evidenced in the nationwide system of statutory guardianships and fully comports with prior decisions of this Court, even in areas where substantive constitutional rights were implicated.

As to how treatment decisions on behalf of an incompetent patient should be made, the Missouri Supreme Court adopted a balancing test between the state's interest in life and the patient's interest, either based upon prior statements of the patient or an assertion that the treatment is burdensome. In applying this test, the Missouri Supreme Court ruled that a clear and convincing

evidence standard should apply. *Addington v. Texas*, 441 U.S. 418 (1979).

The Missouri Supreme Court concluded that evidence regarding the petitioners' wishes was too vague and unreliable to meet that evidentiary standard. This is also consistent with prior decisions of this Court that a state may assure itself that decisions of great import are made explicitly, voluntarily, and with awareness of the consequences. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

The Missouri Supreme Court also considered the nature of the treatment which was proposed to be withdrawn and whether it was burdensome to the petitioner. This is also consistent with this Court's opinions that a state may constitutionally assure itself that decisions made on behalf of individuals who are incompetent to decide for themselves are in their best interests. *Bellotti v. Baird*, 443 U.S. 622 (1979) and *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 1983). Thus, even assuming that a substantive constitutional right extends to treatment decisions on behalf of incompetent wards of the state, the procedures adopted by the Missouri Supreme Court do not permissibly infringe upon that right.

III.

The procedures adopted by the Missouri Supreme Court do not violate the Equal Protection Clause of the Fourteenth Amendment. Incompetent persons are not similarly situated to competent persons and any state intervention in decision-making on behalf of the former

must take into account these "real and undeniable differences." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (1985). The procedures adopted by the Missouri Supreme Court are rationally related to the fact that incompetent persons are unable to decide for themselves, to the state's interest in the lives and welfare of its citizens, and to the often conflicting rights of the patient, i.e. the right to life and the right to refuse treatment.

ARGUMENT

I. THE INSTANT CASE DOES NOT PRESENT AN ISSUE CONCERNING THE EXTENSION OF SUBSTANTIVE DUE PROCESS OR THE CONSTITUTIONAL RIGHT OF PRIVACY TO THE AREA OF REFUSING MEDICAL TREATMENT.

It is a long-standing tradition of this Court to never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N.Y. & Philadelphia SS Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885). In particular, this Court has declined to consider the existence of asserted liberty interests when consideration of procedural issues render a substantive decision unnecessary. *Smith v. Organization of Foster Families for Equality and Reform, supra*. This Court has also declined to consider constitutional questions which were not presented by the facts of the specific case in front of it. *O'Connor v. Donaldson*, 422 U.S. 563, 573-574 (1975). Respondents submit that this principle should be invoked in this case. The arguments advanced by the petitioners and the amici in support of their position are unnecessarily broad when considered in the context of

the specific facts of this case and the availability of an alternative basis for decision. Respondents begin, therefore, with an examination of whether the various issues asserted by the petitioners are appropriately and necessarily presented for a determination by this Court.

A. The Constitutional Right Asserted by Petitioners is No Broader Than the Common Law Right.

Despite the fact that the petitioners argue extensively that an individual's refusal of medical treatment is a right protected by the Fourteenth Amendment, respondents are convinced that this case simply does not present that issue. This is graphically illustrated by the fact that most state courts which have allowed termination of medical treatment have relied upon both federal and state law (either state statutes or state constitutions). See *Rasmussen v. Fleming*, 741 P.2d 674, 681-683 (Ariz.banc 1987); *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626, 633 (Mass. 1986); *In re L.H.R.*, 321 S.E.2d 716, 722 (Geo. 1984); *In re Torres*, 357 N.W.2d 332, 339 (Minn. 1984); *Corbett v. D'Alessandro*, 487 S.2d 368, 370 (Fla.App. 1986); *In re Drabick*, 245 Ca.R. 840, 853, n.20 (Cal.App. 1988); *In re Colyer*, 660 P.2d 738, 741 (Wash. 1983). The New Jersey Supreme Court which, in *In re Quinlan*, 355 A.2d 647 (N.J. 1976), had first concluded that the constitutional right of privacy extended to refusing medical care, now concludes that the right to refuse treatment "is primarily protected by the common law." *In re Farrell*, 529 A.2d 404, 410 (N.J. 1987). Other states have simply found it unnecessary to reach the constitutional claim and have decided

issues on the basis of state law. *In re Gardner*, 534 A.2d 947 (Maine 1987); *In re Storar*, and *In re Eichner*, 438 N.Y.Supp.2d 266 (N.Y. 1981). None of these courts have given any indication that the claimed constitutional right to refuse medical treatment differs in any substantive respect from the common law right.[1] In the opinion below, the Missouri Supreme Court similarly held that a right to refuse medical treatment exists but found its source in the common law rather than in the Constitution. Respondents submit that the constitutional right asserted by the petitioners in no way differs substantively from the state right relied upon by the Missouri Supreme Court. While the common law right enunciated by the Missouri Supreme Court is clearly a state created liberty interest entitled to due process protection (see *Hewitt v. Helms*, 459 U.S. 460, 466 (1983) and *Paul v. Davis*, 424 U.S. 693, 710 (1976)), the substantive reach of this state right vis a vis the asserted constitutional right, is simply not germane to any issue in this case.

Should this Court conclude that the asserted liberty interest is at issue in this case, respondents submit that such a right does not compel the termination of food and water in this instance. First, it must be recognized that the asserted right is to refuse treatment. It is not, to use common parlance, a "right to die." Although attempted suicide has rarely, if ever, been criminalized in this country, it has often been the basis for institutionalization. See

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[1] If anything, the shift away from the Constitution and to the common law as a doctrinal basis in these cases has resulted in more expansive decisions to terminate treatment. See Tribe, "American Constitutional Law", pp. 1364-1365 (2nd Ed. 1988).

O'Connor v. Donaldson, supra at 566 n.2. Most states, on the other hand, do criminalize aiding in the suicide of another. See for instance § 565.023.1(2), RSMo 1986. This is generally reflective of a public policy against suicide. Missouri's Living Will Statute specifically provides that the right to refuse treatment is subject, *inter alia*, to the state's interest in preventing suicide. § 459.055(1), RSMo 1986, reprinted in the Appendix to Petitioners' Brief, pp. 5-8. Most courts which have considered the issue of refusing treatment have acknowledged a state interest in preventing suicide. See *In re Quinlan, supra*.[2] As a result, it cannot reasonably be argued that a right to commit suicide is deeply rooted in the history and traditions of this country or that it is implicit in the concept of ordered liberty.

As to a right to refuse treatment, this Court has never explicitly decided whether the Constitution protects such a decision. See *Mills v. Rogers*, 457 U.S. 291 (1982). Even if this right has a constitutional basis, respondents submit that the right cannot be absolute. The right to privacy is not an absolute right to do with one's body as one pleases. *Roe v. Wade, supra*. If there is no right to an abortion on demand, it is unlikely there is a right to death on demand. Even when a patient is competent to make medical treatment decisions, states are not without

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[2] Most of these courts have avoided any conflict with this state interest by concluding either that there is no intent to die or that the withdrawal of food and water is not the cause of the patient's death. However, the law presumes that we intend the natural, foreseeable consequences of our actions and, as discussed infra, the conclusion as to cause of death plays havoc with normal rules of causation.

authority to control conduct involving only a consenting adult. *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 68 (1973). Courts which have adopted the constitutional basis of the right to refuse treatment have "hesitated to embrace an unqualified right." Tribe, *supra* at 1366. When a person is not faced with "imminent death" or a life of "enduring pain" and when the treatment is routine and minimally invasive, state acquiescence in refusal of treatment "appears not substantially different from state sanction of suicide." *Id.* at 1367. Thus, even a constitutional right to refuse treatment must stop short of compelling states to recognize a "right to die" or suicide. Determining in any particular case whether a patient is asserting a protected right to refuse treatment or an unprotected "right to die" presents the sort of "delicate question" facing courts which have to determine whether a "religious" belief or practice is entitled to constitutional protection. See *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972). Wherever the line demarcating the area of constitutional protection may ultimately be drawn, respondents submit that a proposed withdrawal of food and water is clearly not constitutionally protected. To the extent that Missouri, or any state, chooses to recognize, to any degree, a refusal of food and water, it is an instance of a state creating a right or interest broader than the Constitution. See *Mills v. Rogers, supra*. States retain discretion to act in areas or ways in which they are not constitutionally compelled. *Paris Adult Theater I v. Slaton, supra*, at 64. This necessarily contemplates that there will be variations among the states in whether or how they choose to act. However, this variation alone is not a violation of any constitutional principles.

> The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum.

Addington v. Texas, supra at 431. Thus, respondents submit that the petitioners' request to terminate the provision of food and water to Nancy Cruzan is not entitled to substantive constitutional protection and that the true issues in this case are whether the standards and procedures adopted by the Missouri Supreme Court meet the constitutional minimum.

B. Missouri Has Imposed No Substantive Limits Upon the Exercise of the Common Law Right to Refuse Treatment.

In the opinion below, the Missouri Supreme Court did not foreclose or mandate any particular medical judgment.[3] Thus, insofar as substantive due process or privacy is concerned, this case is immediately

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[3] The accusation that the Missouri Supreme Court predetermined the issue is somewhat ironic given the fact that the court itself was concerned with the apparent predetermination by the courts of other states as a result of their discounting entirely the state's interest in preservation of life. Pet.App., p. A19. One could hardly imagine a stronger predetermination than that of the New Jersey Supreme Court when it stated it was difficult to conceive of a case in which the state could have a strong enough interest to reach any result other than termination of treatment. *In re Jobes*, 529 A.2d 434, 444 (N.J. 1987).

distinguishable from *Roe v. Wade, supra*, and *Doe v. Bolton*, 410 U.S. 179 (1973). The constitutional defect in those cases was that states had arbitrarily and broadly imposed a judgment on a medical treatment decision, i.e., the decision to abort a pregnancy. In the instant case, the Missouri Supreme Court imposed no such prejudgment with regard to any treatment decision on behalf of incompetent patients. Instead, it has adopted a balancing test to be applied on a case-by-case basis. Cf. *Winston v. Lee*, 470 U.S. 753 (1985) (adopting a case-by-case approach under the Fourth Amendment).

Petitioners now rely upon a liberty interest of bodily integrity against intrusion as enunciated in cases such as *Rochin v. California*, 342 U.S. 165 (1952). *Rochin* was decided at a time before this Court had directly applied the Fourth Amendment to the states. Based upon later cases such as *Schmerber v. California*, 384 U.S. 757 (1966), it is apparent that today such cases would be decided under the Fourth Amendment. Further, these cases place no absolute substantive limit on intrusions of bodily security. This Court has held that the Fourth Amendment neither forbids nor permits all such intrusions. The Fourth Amendment guards against intrusions which are not justified in the circumstances or which are made in an improper manner. *Id.* at 768. See also *Winston v. Lee, supra*, at 760.

C. Any Right of Choice Cannot Be Exercised By an Individual Who is Totally Incompetent to Make Valid Decisions.

Choice is an essential aspect of an interest of bodily integrity. The parties in *Rochin, Schmerber* and *Winston*

could have consented to the procedures. The constitutional issue arose only when the state sought to override their objections.

The right of privacy, relied upon by the petitioners below, has been similarly characterized by this Court as one of choice or decision. *Roe v. Wade, supra,* at 153. It is conceded that Nancy Cruzan is incapable of exercising the right to refuse or receive treatment. Petitioners' Brief, p. 22.[4] Indeed, ascribing to a patient who is comatose or in a PVS, rights which require an affirmative exercise is highly problematic. Tribe, *supra,* at p. 1368, n.25.

However, the fact of incompetency, and the resultant inability of an individual to exercise the right, has generally been deemed irrelevant by most state courts considering the issue. Beginning with *In re Quinlan, supra,* at 664, most courts have simply held that in order to avoid destruction of the right, it must be exercisable by someone else. This step was taken, and followed by other courts, with little or no analysis. They fail to realize that certain constitutional rights presume a person capable of exercising them. For instance, the freedom of speech presupposes a willing speaker. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 756 (1976). Similarly, the liberty/privacy interest in freedom from unwarranted government intrusion in *individual decisions, Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972), presupposes one capable of making a decision. If in fact a person may be said to lose the right, or more

[4] This is not a case in which a patient is only partially incompetent and, therefore, may retain the right to make some decisions personally.

accurately to lose the ability to exercise it, that is not the sort of loss that implicates the Fourteenth Amendment. Only a governmental deprivation of liberty invokes the Fourteenth Amendment. *Parham v. J.R.,* 442 U.S. 584, 622 (1979) (Justice Stewart concurring). Thus, even if it might be said that Nancy Cruzan has lost her right to make medical treatment decisions, it has been caused by natural events rather than governmental actions.

The fact of a patient's incompetency to make any decisions may be viewed as an obstacle to the exercise of whatever rights the patient might have. However, the conclusion of the petitioners and many courts that something must be done to avoid this result implies that they believe the state is obligated (presumably by the Constitution) to do so. However, this Court has repeatedly held that an individual is not entitled to affirmative government assistance which may be necessary to secure life or liberty. *DeShaney v. Winnebago County Dept. of Social Services,* 109 S.Ct. 998 (1989); *Webster v. Reproductive Health Services, Inc., supra; Harris v. McRae,* 448 U.S. 297, 316 (1980). That a state, through the exercise of its *parens patriae* power, has established a system by which decisions can be made on behalf of incompetents is a far cry from concluding that a state must do so in any particular manner or to achieve any particular result. Considering any system by which a state acts on behalf of incompetents, invokes very different principles than does a state attempt to foreclose or limit decisions of fully competent individuals.

For instance, the New Jersey Supreme Court imposed a requirement of independent confirmation by a hospital

committee, *In re Jobes, supra* at 468, a result clearly inconsistent with the personal rights of the patient. *Doe v. Bolton, supra* at 198. The confirmation requirement is more akin to a due process protection against arbitrary state action via the surrogate. *Parham v. J.R., supra.*

In *Planned Parenthood v. Danforth, supra* at 69 (1976), this Court struck down a state-imposed requirement of spousal consent for an abortion. The state could not delegate a veto power which it could not exercise itself. The petitioners assertion that a surrogate may exercise the patient's right to refuse treatment implies that the surrogate can veto the exercise of the right. Assuming that the right to refuse treatment is of constitutional magnitude, such a delegation would clearly restrict the exercise thereof by the patient. These comparisons clearly demonstrate that the issue presented is not the personal right of the patient. The crucial questions are who is authorized to act on behalf of an incompetent patient and upon what basis may they act. The difference is between the right of a patient to choose and the "right" of a surrogate to choose for the patient. A failure to recognize this crucial difference can only "lead to poorly reasoned decisions." Nowak, Rotunda & Young, "Treatise on Constitutional Law", Vol. 2, pp. 606-607 (1986).

Some of the amici appear to recognize this distinction. For instance, the National Hospice Organization at page 13 of its brief states: "The only difference between competent and incompetent patients is the *means* by which their right . . . is implemented." Because it is impossible to ascribe to Nancy Cruzan a right requiring conscious exercise, respondents believe it is more accurate to say that the difference is the means by which

treatment decisions are made. On the other hand, the Society for the Right to Die, at page 15 of their brief, states that: "The state should protect its citizenry from abuse by regulating the way decisions are made . . . " Respondents submit that that is precisely what the Missouri Supreme Court did. How it did so is addressed in the next section.

II. THE MISSOURI SUPREME COURT'S OPINION BELOW REGARDING THE MANNER IN WHICH MEDICAL TREATMENT DECISIONS ON BEHALF OF INCOMPETENT PATIENTS SHOULD BE MADE DID NOT DENY OR INFRINGE THE PETITIONERS' RIGHT TO DUE PROCESS OF LAW.

A. The Missouri Supreme Court Decision.

As noted earlier, the Missouri Supreme Court did not place any substantive limitation upon a patient's right to refuse medical treatment. However, because the decision below has been mischaracterized in other ways as well, respondents believe it appropriate to review the Missouri Supreme Court's decision.

First, the Missouri Supreme Court recognized that this was not a case of letting someone die because Nancy Cruzan was neither dead nor terminally ill. The Court realized that it was being asked to make a decision that would cause her to die. Pet.App., p. A9. The conclusion that the aim in this case was to cause Nancy Cruzan's death, as opposed to merely halting an invasive medical procedure, is borne out by the record in this case. Sound medical practice would evidently call for leaving the tube in place (Tr. 490). The only question remains is what use

is to be made of the tube.[5] The petitioners simply request that it not be used to supply nutrition or hydration sufficient to maintain life and therefore to inevitably cause the death of Nancy Cruzan.

Since that is the petitioners' ultimate aim, the Missouri Supreme Court concluded that the state's interest in preserving life was most at issue and was particularly valid because Nancy Cruzan is presently alive and not terminally ill. Pet.App., p. A29. So long as one is a person, one's right to life is specifically protected by the Fourteenth Amendment. *Roe v. Wade, supra* at 156-57. Unlike *Roe*, there is no disagreement about personhood. The petitioners' whole case is based upon the fact that Nancy Cruzan is a person. Thus, the state not only has an interest in preserving life, but also an obligation to see to it that an individual's life is not taken without due process of law. The case also presents a conflict between a patient's right to life and a patient's right to refuse treatment. The Missouri Supreme Court felt that it must protect both interests rather than automatically favoring termination of treatment.

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[5] Respondents submit that too much attention has been focused on the mechanism by which food and water is provided. The decision to insert a tube was not made because she could not be fed orally but because it made her long term care easier (Tr. 423). Because no oral feeding has been attempted in six years it may not be possible now (Tr. 699, 714). Is it the mechanism, designed for convenience and safety, which implicates the Constitution, or is the issue simply food and water regardless of the means of providing it? According to Dr. Cranford, even spoon feeding is medical treatment (Tr. 163-65).

> Any substantive principle of law which we adopt must also provide shelter for those who would choose life – if able to choose – despite the inconvenience that choice might cause others.

Pet.App., p. A26.

This brings us to the most mischaracterized portion of the Missouri Supreme Court's opinion. The Missouri Supreme Court decided that the state's interest in preserving life was unqualified. The petitioners and the amici have interpreted this to mean that it is without exception and can never be overcome by any showing at all. However, that ignores the plain language of the opinion. The Missouri Supreme Court concluded that the state's interest in life "rests on the principle that life is precious and worthy of preservation without regard to its quality." Pet.App., p. A26. The Court also stated that:

> It is tempting to equate the state's interest in the preservation of life with some measure of quality of life. As the discussion which follows shows, some courts find quality of life a convenient focus when justifying the termination of treatment. But the state's interest is not in quality of life. The broad policy statements of the legislature make no such distinction; nor shall we. Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified.

Pet.App., p. A29. Thus, the Court's characterization of the state's interest in life as unqualified means that the interest does not vary depending upon a patient's degree of incapacity or upon an assessment that his/her life is not

worth living. See *In re O'Connor*, 534 N.Y.S.2d 886, 892 (1988).

Since the state's interest does not vary with the degree of incapacity, the Missouri Supreme Court adopted a single balancing test to be applied for all incompetent patients.[6] It declined to hold that more impaired patients were not worthy of as much protection prior to termination of treatment. Compare *In re Conroy*, 486 A.2d 1209 (N.J. 1985) and *In re Peter*, 529 A.2d 419, 424 (1987) (the assumption that continued sustenance confers a benefit is not valid in the case of PVS patients). The Missouri Supreme Court refused to make such a societal valuation of life. See Tribe, *supra* at 1367-68.

The Missouri Supreme Court concluded that a court, rather than a guardian, must make the decision on whether to terminate treatment. As to the process by which this judicial decision should be made, the Missouri Supreme Court adopted a clear and convincing evidentiary standard to be applied to the interests asserted on behalf of the incompetent patient, whether those interests be in the form of specific wishes of the patient or the burdens which treatment would impose upon a patient. In some fashion then, the decision to terminate treatment must be in the best interests of the patient, either because the patient has so decided or because there is objective evidence that termination of treatment is appropriate. Respondents submit that each of these procedures is consistent with principles adopted by this Court and does not deny or infringe petitioners' right to due process of law.

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[6] This is not to say that a patient's medical condition is irrelevant but simply that a different test will not be applied depending upon what that condition is.

B. It is Not Unconstitutional to Delegate to a Judicial Body the Decision-Making Authority When the Question Presented is Whether Life-Sustaining Treatment to an Incompetent Ward of the State Should be Terminated.

The Missouri Supreme Court concluded that state law made no provision for a guardian to decide whether medical treatment to an incompetent ward should be terminated. Pet.App., p. A39. Instead, Missouri law specifically imposed the responsibility upon a guardian to "assure that the ward receives medical care and other services that are needed." 475.120.3(2), RSMo 1986. This does not remove from the guardians all decision-making authority with regard to medical treatment of their ward. Missouri law indicates that there is a discretionary range within which guardians may make decisions regarding the provision of necessities to their ward. *Hendrickson's Estate v. Hendrickson*, 604 S.W.2d 17 (Mo.App., W.D. 1980). However, the cessation of medical care is an extraordinary step, as would be the cessation of any other type of care or service that a guardian is normally obligated to provide. It was this type of extraordinary decision that the Missouri Supreme Court concluded was beyond the authority of the guardian.[7] *In re O'Connor, supra* at 891.

The petitioners' claim is that a state must delegate the decision-making authority to a family member and

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[7] One amicus suggests that the Missouri Supreme Court was incorrect in this conclusion. See Brief of Missouri Hospitals, et al., p. 21. However, the authority of the guardians is a question of state law which respondents submit is binding upon this Court. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981).

that it is not constitutionally permissible to assign the authority to the court. In assessing this argument, it must be kept in mind that the parents have never asserted that they have any parental right entitling them to make this decision. Such an argument was specifically rejected in *In re Quinlan, supra,* at 664. The New Jersey Supreme Court held that insofar as a parental right of privacy has been recognized it has been in the context of decisions regarding the rearing of infants. Termination of life-sustaining treatment, like institutionalization, is not the sort of child-rearing decision this Court has protected in the past. *Parham v. J.R., supra* at 631 (Justices Brennan, Marshall and Stevens). To the extent that any parents of an adult ward of the state are asserting rights to make decisions on behalf of their adult child, they do so as court appointed guardians. *In re Quinlan, supra* at 664. Guardianship, however, is a state created relationship. Cf. *Smith v. Organization of Foster Families for Equality and Reform, supra* (foster home is a state created relationship).

Although the petitioners' assertion is that there is a constitutional obligation to delegate decision-making authority to the family, many courts have turned to state law for the answer. *Rasmussen v. Fleming, supra; In re Colyer, supra; In re Drabick, supra;* and *Severns v. Wilmington Medical Center,* 425 A.2d 156 (Del. 1980). Whatever answer state law might provide, respondents submit that that is the appropriate source to which to turn for a decision. Statutory guardianships are an exercise of the state's *parens patriae* power to provide for its citizens who are unable to care for themselves. *Addington v. Texas, supra; In re Link,* 713 S.W.2d 487, 493 (Mo. banc 1986). As a result, it has been recognized by both state and federal

courts that a guardian is an officer of the court and is always under the court's control and subject to its directions as to the person of the ward. *In re Terwilliger,* 450 A.2d 1376, 1380 (Pa.App. 1982); *Oyama v. State of California,* 332 U.S. 633 (1948); *Christoffel v. E.F. Hutton & Co., Inc.,* 588 F.2d 665 (9th Cir. 1978); and *Martineau v. City of St. Paul,* 172 F.2d 777 (8th Cir. 1949).

Statutory guardianships are not only widespread but the product of a long-standing tradition. The concept of guardianships on behalf of incompetents dates back to medieval England when it was originally the function of the lord of the manor. However, by the fourteenth century it was well recognized as a duty of the Crown. Lindman & McIntyre, "The Medically Disabled and the Law" (Univ. of Chicago Press, 1961) p. 218. This Court has recognized, as part of this long-standing tradition, that the former power of a royal sovereign has now been transferred to each state.

> This prerogative of parens patriae is inherent in the supreme power of every state, whether that power is lodged in a royal person, or in the legislature, and has no affinity to those arbitrary powers which are sometimes exercised by irresponsible monarchs to the great detriment of the people, and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity and for the prevention of injury to those who cannot protect themselves.

Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1, 57 (1890). Thus, although the particular decision presented in the instant case is of fairly recent origin, due to the advance of

medical technology, the system by which decisions on behalf of incompetent persons are made is centuries old. Respondents submit that there is no constitutional obligation to deviate, in this instance, from the long-standing tradition of a state's *parens patriae* authority.

In seeking to identify either substantive liberty or privacy rights, this Court has generally sought to identify such rights as are either deeply rooted in our country's history and tradition or are "implicit in the concept of ordered liberty." See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 790-791 (1985) (Justice White dissenting). Neither is present with regard to the petitioners' claim that there is a liberty or privacy right which allows one's family to decide to terminate food and water. As noted above, some states may, in the exercise of their *parens patriae* power, have delegated the authority to make such decisions to family members.[8] That is not to say, however, that they were constitutionally obligated to make that particular delegation of authority. Respondents believe it significant that in answering that question, states have turned not to constitutional principles but to state guardianship law and the principles of a state's *parens patriae* power. Further, given the centuries old tradition, respondents submit that an asserted right to a decision by the family is not "implicit in the concept of ordered liberty." The petitioners' invocation of this Court's opinions regarding

[8] Petitioners refer to the fact that Nancy's father signed the consent for insertion of the tube. So did her husband. However, to the extent either had the authority to give valid consent, it was a function of state law.

familial rights are insufficient because the right they assert is not a logical or necessary extension of those principles, any more than homosexual activity was a logical or necessary extension of this Court's opinions on the privacy of sexual relations. *Bowers v. Hardwick*, 478 U.S. 186 (1986). Respondents submit that the *parens patriae* tradition, including the authority of the state to delegate by whom and under what circumstances decisions may be made on behalf of incompetent persons, is too long-standing a tradition and too well entrenched for it now to be said that it violates a substantive liberty or privacy interest on either of the bases previously identified by this Court.

Even in the area of parental or familial rights regarding minor children, where a stronger argument might be made against state intervention, this Court has explicitly "recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R., supra* at 603 (1979). In *Parham*, the issue was what procedural protections adequately guarded a child's constitutional rights. This Court concluded that the risk of error in a parental decision of institutionalization for their child was sufficiently great that there should be some sort of "neutral fact-finder" to determine whether requirements for admissions were met. *Id.* at 606. Respondents submit that the risk of error in a parental or familial decision to terminate nutrition and hydration is equally as great. Family members may not be the best decision makers in this instance. *Id.* at 632; *In re Eberhardy*, 307 N.W.2d 881, 897 (Wisc. 1981). Amicus AMA argues that an individual has a right to minimize

the suffering of others. See Brief of the AMA, et al., p. 24. But the question then would become who is to exercise that right. The answer the AMA would give is that the decision should be made by the ones who are suffering. However, it is for that very reason the respondents believe that a state can and should insist upon a neutral judicial decision.

Parham v. J.R. supra, also discusses the distinction between the constitutional requirements of due process and what is constitutionally permissible. Even though the majority in *Parham* did not impose a constitutional requirement of a judicial hearing prior to institutionalization of a minor, a state remained free to establish such a system. *Id.* at 611, n. 18. As Justice Stewart said in his concurring opinion in that case, the Constitution would tolerate it even if not compel it. *Id.* at 625. The dissenters in *Parham* argued that a judicial hearing was required prior to institutionalization.

> In our society, parental rights are limited by the legitimate rights and interests of their children. . . . This principle is reflected in the variety of statutes and cases that authorize state intervention on behalf of neglected or abused children and that, inter alia, curtail parental authority to alienate their children's property, to withhold necessary medical treatment, and to deny children exposure to ideas and experiences that they may later need as independent and autonomous adults.

Id. at 630. Thus, the unanimous view of the court in *Parham* was that there was no constitutional infirmity in a state decision to require judicial approval prior to institutionalization of a minor child. Similarly, there should be

no constitutional infirmity in a state decision to require a judicial decision prior to the termination of life-sustaining treatment for an incompetent patient.

Such a procedure is also consistent with this Court's decisions on abortion, where a substantive liberty and/or privacy right was implicated. In *Bellotti v. Baird, supra,* this Court held that if a state required a pregnant minor to obtain parental consent prior to abortion, it must also provide an alternative procedure whereby authorization for the abortion could be obtained. *Id.* at 643. Although a judicial proceeding was not the only possible alternative, that was the particular procedure approved in *Bellotti.* In such a proceeding, the pregnant minor should be allowed to show either that she was mature enough and well enough informed to make the decision personally or that even if she was not, the abortion would be in her best interest. See also *Akron v. Akron Center for Reproductive Health, supra.* Thus, for one who has not given and is not capable of giving informed consent, a state may constitutionally delegate the decision-making authority to a judicial body to be based upon the best interests of the patient.

As the petitioners themselves have noted, the power to consent to treatment necessarily implies the power to refuse treatment. This Court has specifically held that a state may not constitutionally delegate such decision-making authority, at least where the individual is capable of asserting their own rights. *Planned Parenthood v. Danforth, supra* at 75. Petitioners argue, however, that such a delegation to a family member is constitutionally required when a patient is incapable of exercising their rights personally. If that were true, there would be no

reason for this Court to have struck down a parental consent requirement, at least in cases where a minor is too immature and not fully informed enough to make the decision personally. This Court did not take that approach and instead approved a procedure of an independent judicial determination of the competency and best interests of a minor.

The adoption of a similar procedure on behalf of incompetent adult patients poses no constitutional difficulties. As this Court has recognized, children have a special place in life which the law should reflect. *Bellotti v. Baird, supra* at 633. The tradition of a state's *parens patriae* power is based upon a similar assumption; that incompetent persons who are unable to care for themselves are deserving of special state consideration and concern. See *In re Eberhardy, supra* at 897. The Missouri Supreme Court has acted upon that concern by providing a degree of protection similar to that already approved on behalf of minors. There is, therefore, no constitutional obligation that a state assign decision-making authority on behalf of incompetents to a member of the patient's family.

C. Judicial Consideration of the Explicitness and Circumstances Surrounding a Prior Statement By a Person Now Incompetent Regarding Future Treatment Decisions is Not Unconstitutional.

The Missouri Supreme Court concluded that evidence of prior statements by Nancy Cruzan which purported to demonstrate her wish not to receive artificial nutrition and hydration, were unreliable and did not

constitute clear and convincing proof of her intent. Pet.App., p. A37.[9] Thus, the explicitness and knowledgeability of any prior statements is a relevant consideration in the application of its balancing test. Respondents submit that neither the standard nor the Missouri Supreme Court's application of it results in the deprivation of any constitutional right of the petitioners.

It cannot be denied that the decision to withdraw life-sustaining treatment is one of great significance and respondents submit that it would therefore be "imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood v. Danforth, supra* at 67. In *Danforth,* this Court held that in view of the significance of the abortion decision, a state could constitutionally insist upon prior written consent of the woman. Respondents submit that the decision to terminate life-sustaining treatment is even more significant than that pertaining to an abortion and that the imposition of a lesser requirement of clear and convincing evidence of a knowledgeable choice by a now incompetent patient is not unconstitutional. See *In re O'Connor, supra* at 892.

Further, the Missouri Supreme Court's establishment of such a standard is a rational method of addressing the significant and conflicting interests at stake in this case. Reliance upon prior statements of a now incompetent

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[9] Even the trial court's findings did not arise to a determination that her wishes were established by clear and convincing evidence. The trial court found only that the evidence "suggests that given her present condition she would not wish to continue on with her nutrition and hydration." Pet.App. A98.

patient is not automatically a matter of right. The exercise of a right in advance is a dubious proposition because there can often be serious doubt that a prior directive is a clear and autonomous choice which is worthy of respect. Donald L. Beschle, "Autonomous Decision-Making and Social Choice: Examining the 'Right to Die' ", 77 Kentucky Law Journal 319, 341 (1988). *In re O'Connor, supra* at 892. The court in *In re Drabick, supra* at 856, characterized the waiving of a constitutional right years in advance by means of casual conversation as "dangerously unpredictable." It is highly doubtful that this Court would ever find a waiver of a constitutional right, even one not as significant as the right to life, on the basis of the sort of evidence presented in the instant case.

In order for a waiver of the constitutional right to be effective, it must represent an "intentional relinquishment or abandonment of a known right or privilege" as well as being intelligent and competent. *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938). To be knowing and intelligent, a waiver must be done with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *In re O'Connor, supra* at 893. As the court in *In re Drabick, supra* noted, the cases dealing with termination of life-sustaining treatment are the only line of cases allowing exercise or waiver of constitutional rights in advance. The dangers of this are illustrated by *In re Torres, supra,* in which there was no direct evidence of any prior statements by the patient. However, the Minnesota Supreme Court found that the argument against terminating treatment "neglects the possibility that Mr. Torres might not want his life prolonged without a hope of recovery." *Id.* at 340. They went on to state that Mr. Torres "may well have wished to avoid" continued treatment. *Id.* In other words,

the court either assumed that the patient would want treatment terminated or adopted a presumption in favor of it. Respondents submit that such a significant decision can not be based upon mere assumption.[10] Even courts which have allowed termination of life-sustaining treatment have found statements such as those in the instant case insufficient to justify that decision. The New Jersey Supreme Court found evidence of similar statements to be "remote, general, spontaneous, and made in casual circumstances" and, therefore, "unreliable." *In re Jobes, supra* at 443. The Missouri Supreme Court's similar conclusion is not a denial or infringement of petitioners' constitutional rights.

Petitioners also complain about the failure of the Missouri Supreme Court to consider the evidence pertaining to Nancy Cruzan's lifestyle which they argue indicates what decision she would want made. The problem with such evidence is that it is more unreliable than evidence of prior statements. Petitioners argue that the evidence inevitably leads to the conclusion that Nancy would not choose her present state. However, that is not the appropriate question because no one, having any option at all, would choose to be in this position. The appropriate question is how one would deal with such a situation if it did exist. One might ask whether Ms. Cruzan would consider it ethical or moral to withdraw

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[10] Neither can it be based upon opinion polls such as those cited in the briefs. See *Penry v. Lynaugh*, 109 S.Ct. 2934, 2955 (1989). If those polls are to be believed, one could conclude that any person taken at random would not want treatment continued and it might be possible to dispense with a hearing altogether.

nutrition and hydration from someone else. From the evidence that Ms. Cruzan was a compassionate and caring person, one could conclude that while she might believe death would be a blessing if it came, she would not take any action to hasten it. Further, the evidence that she was strong-willed, not one to admit defeat easily, and one who disliked others trying to impose their decisions upon her, are also inconsistent with the idea of someone making such a significant decision for her.

Further, are we to conclude from the petitioners' arguments that all happy, well-adjusted, twenty-five year olds would want treatment withdrawn? Conversely, what sort of lifestyle evidence would indicate a person who did not want treatment withdrawn? Would a person who is unhappy, maladjusted and elderly not want treatment withdrawn? It could be argued with equal conviction that this is also the very sort of person who would not want their life sustained. In short, evidence of "lifestyle" is so inherently inconclusive that it simply cannot arise to the level of clear and convincing evidence of a person's intent. The AMA argues that the Missouri Supreme Court failed to "appreciate patient autonomy as a limiting factor against state abuse." See AMA Brief, p. 44. However, what the AMA fails to appreciate is that "patient autonomy" based upon such evidence as vague statements and lifestyle is no limiting factor at all. See *In re O'Connor, supra* at 893.

It is suggested by the petitioners and some of the amici that the Missouri Supreme Court erred in removing doctors from the treatment decision. Respondents submit that is simply incorrect. Doctors are as much a part of a

treatment decision as they ever were. It is simply a question of recognizing precisely what their proper role is. That role is never to make the treatment decision itself. Rather it is to give advice and provide all the available options from which someone else will make the decision, whether it be a patient, a guardian, or a probate court.[11] The AMA, at p. 44 of its Brief recognizes that it is not the doctor's decision when it states that those who wish treatment prolonged will have it "with the full support of the medical community." However, contrary to the suggestion of the AMA, the goal of the Missouri Supreme Court is not to require treatment for those who do not want it or to thwart a patient's wishes. Rather, it is to reliably identify those who would want treatment continued as well as those who might want it terminated. That goal cannot be met by adoption of the standard favored by the petitioners. The American College of Physicians at pp. 23-24 of its brief states that being in a PVS "yields only prima facie grounds for an inference that treatment should be withdrawn. The inference is rebuttable based upon evidence that an individual patient would have wished otherwise." Thus, one would apparently require

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[11] It is suggested by the Missouri Hospitals, et al. at p. 24 that the decision of the Missouri Supreme Court encourages doctors to forego initiating treatment because of fears that it will later be impossible to withdraw it. Frankly, respondents cannot take that possibility seriously. To either initiate or forego treatment is not the doctor's choice in the first instance and the failure to advise of all reasonable treatment alternatives would be a clear violation of a physician's ethical obligations. Respondents submit that it would not be appropriate for a court to render a decision based upon a mere assumption that doctors would act unethically.

an explicit statement that an individual would want treatment continued. This standard would place an undue burden upon an individual's ability to exercise his or her right to life. The Missouri Supreme Court clearly rejected this sort of slanted decision-making mechanism. The approach adopted by the Missouri Supreme Court is not only a rational choice based upon competing interests but is clearly consistent with prior opinions of this Court and is not unconstitutional.

D. Consideration of Whether the Treatment Which is Proposed to be Terminated is Burdensome to an Incompetent Patient is Not Unconstitutional.

As explained earlier, the Missouri Supreme Court adopted a balancing test which included an assessment not only of prior statements of a now incompetent patient but also whether the particular treatment at issue was burdensome. This is no different than the best interest test which this Court approved in *Bellotti v. Baird, supra.* Petitioners argue, however, that the Missouri Supreme Court limited their analysis only to whether the treatment was painful. Respondents strongly disagree with that characterization of the Missouri Supreme Court's opinion. While it is always a dangerous proposition to try to predict what a court might do in some future case, respondents submit that a fair reading of the opinion below clearly demonstrates that factors other than pain being experienced by an incompetent patient may be appropriately considered.

Initially, with regard to the question of pain, the Court found that the care provided to Ms. Cruzan did not

cause her pain. Pet.App., p. A38. This conclusion, however, was not necessarily based upon acceptance of testimony that a person in a PVS was simply incapable of experiencing pain. The Court stated that even if the testimony were to be believed that she was incapable of experiencing pain, then it would be difficult to conclude that the treatment itself was painful. Pet.App., p. A36. Thus, the Supreme Court did not necessarily accept that testimony and, the findings of the trial court in that regard were somewhat tenuous. The trial court found that:

> Her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinary painful stimuli, indicating the experience of pain and her apparent response to sound.

Pet.App., p. A95. In short, the Missouri Supreme Court considered pain as a relevant criteria but not one which favored termination of treatment in this case. If she lacks the ability to experience pain, then continuing treatment was not burdensome to her in the sense that it would be painful. On the other hand, if she has the ability to experience pain, the current treatment is not painful to her and termination of it might be.

However, pain was not the only factor considered. The Court considered the nature of the treatment and whether it might be characterized as ordinary or extraordinary. It criticized those courts which had abandoned consideration of that factor. Pet.App., pp. A30-A31.

The Court considered the effectiveness of the treatment at issue, but cautioned that effectiveness cannot be equated with the ability to cure an underlying condition. Pet.App., p. A36.

The Court considered that it was being asked to discontinue treatment presently being provided rather than to forego the initiation of some new treatment. "The *continuation* of feeding through the tube is not heroically invasive." (Emphasis in the original). Pet.App., p. A34.

The Court also considered the fact that Ms. Cruzan is not terminally ill and that her death is imminent only if she is denied food and water. Pet.App., p. A26, A38.

One might speculate that a different result would be reached in cases of a patient who is terminally ill or who is experiencing greater pain or for whom the proposed treatment would be much more invasive or for whom it is less effective. The Court might also have reached a different result if the question were the initiation of a new treatment. In future cases there might be additional factors which are not present here. For instance, a particular form of treatment might present significant risks to the patient. Although the tube feeding of Ms. Cruzan has presented no major complications, such complications are possible, even in cases of tube feeding. See Brief of the AMA, et al., at p. 14.

In summary, respondents submit that the approach taken by the Missouri Supreme Court is simply that treatment may not be considered in a generic sense and that in deciding to provide or to withdraw treatment, all forms of treatment cannot be considered identically. Presumably, a competent patient making a treatment decision on his own behalf would consider the nature of the treatment, its invasiveness, the risks it posed and its possible effectiveness. When a decision is to be made on behalf of

an incompetent patient, those same factors should be considered and to do so is not unconstitutional.

E. The Position Advocated By Petitioners Reflects Neither Sound Law Nor Sound Policy.

There are several major weaknesses with the petitioners' position. First, it seeks to elevate to constitutional magnitude the highly dubious doctrine of substituted judgment. It has been suggested by one commentator that the use of the term "right to die" allows us to pretend that a decision is in actuality a non-decision. It fosters the illusion that society is maintaining neutrality and only acceding to the wish of an incompetent patient. Beschle, *supra* at 322. However, courts and commentators alike have noted the fundamental problem with characterizing a third party choice as actually that of the patient. *Id.* at 345; *In re Eberhardy, supra* at 893 ("legal legerdemain" cannot equate a decision made by others with a personal decision); *In re Grant*, 747 P.2d 445, 461 (Wash. banc 1987) (Judge Goodloe dissenting). Claiming that the right to make a treatment decision survives incompetency is a legal fiction at best. *In re Drabick, supra* at 856. Attempting to decide how an incompetent person would decide if they were competent has been characterized as reaching "almost Alice in Wonderland proportions," Tribe, *supra* at 1369. Apart from that whimsical characterization, the doctrine also raises ominous concerns.

> By characterizing the transaction as "consensual" rather than "compulsory", third-party consent allows the truly involuntary to be declared voluntary, thus bypassing constitutional, ethical and moral questions, and avoiding the violation of taboos. Third-party consent is a miraculous creation of the law – adroit, flexible, and useful in covering the unseemly reality of conflict with the patina of cooperation.

Price and Burt, "Sterilization, State Action, and the Concept of Consent", 1 Law and Psychology Review, 57, 58 1975, p. 58.

Further, petitioners' position fails to acknowledge that the state is not being asked to maintain neutrality. The state is being asked to confer the power to make life-and-death decisions upon third parties. This Court is being asked to hold the states are constitutionally obligated to do so. *Sanchez v. Fairview Developmental Disabilities Treatment Center, et al.*, No. CV88-10129FFF(Tx) (C.D.Calif. March 30, 1988) slip op. p. 8; Yale Kamisar, "Speaking Out: Karen Ann Quinlan and the 'Right to Die'", Law Quadrangle Notes, Univ. of Michigan Law School, Vol. 29, No. 4, Summer of 1985, p. 2. As a result, the state has an obligation to assure that its role in such a process does not result in a deprivation of life without due process.[12] The exercise of the asserted right to refuse medical treatment will, in this particular instance, inevitably lead to the death of Nancy Cruzan, thereby constituting a waiver of her constitutional right to life.

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[12] When considering only a right of privacy, there has been found sufficient "state action" for constitutional purposes. *In re Colyer, supra.*

Petitioners have failed to acknowledge this conflicting interest. Courts have generally avoided this problem altogether by concluding that the cause of death is not the withdrawal of life-sustaining treatment but the underlying medical condition. *In re Gardner*, 534 A.2d 947, 956 (Maine 1987). However, such a conclusion distorts, if not completely ignores, basic rules of causation. Respondents doubt that a doctor would be able to defend a malpractice action on the basis that his failure to treat a patient properly was not the proximate cause of the patient's death because the death was caused by the underlying disease.

Many of these cases also result in "ad hoc nullification" of other rules or doctrines. See *Thornburg v. American College of Obstetricians and Gynecologists, supra* at 814 (Justices O'Connor and Rehnquist dissenting). As the court noted in *In re Drabick, supra* at 856: " . . . we have found no authority – other than cases on the subject of life-sustaining treatment – to support the idea that a person can exercise (or waive) a fundamental constitutional and common law right unintentionally through informal statements years in advance." There is also the conclusion of the Massachusetts Supreme Court that a state must afford to incompetent persons "the same panoply of rights and choices it recognizes in competent persons." *Brophy v. New England Sinai Hospital, Inc., supra* at 634. Presumably this could include the right to vote, the right to marry, or the right to contract. Respondents submit that normal rules should not become irrelevant just because a case deals with the withdrawal of life-sustaining treatment. See *Planned Parenthood v. Danforth, supra* at 98 (Justices White, Burger and Rehnquist).

It is by no means clear where these questionable legal doctrines, fictions and euphemisms would lead. The petitioners' position is somewhat akin to setting sail without a sextant or rudder: not knowing where one is and having no control over one's destination. Since petitioners advance no principled basis upon which the doctrine of substituted consent can be limited, the constitutionalization of the doctrine could undermine the centuries old tradition of statutory guardianships. It would definitely call into question case law and statutes which have put certain matters beyond guardianship authority and require court approval. *In the matter of Terwilliger, supra* (judicial approval required for sterilization); see also *In re C.D.M.*, 627 P.2d 607 (Alaska 1981); *In re A.W.*, 637 P.2d 366 (Col. banc 1981); and *Ruby v. Massey*, 452 F.Supp. 361 (D. Conn. 1978). By statute, the State of Missouri has required judicial approval before an incompetent ward can be subjected to indefinite commitment to a mental institution, psychosurgery, or electroshock therapy. See §§ 475.120.5, 475.121, 630.130 and 630.133, RSMo 1986.

To put the matter in a different perspective, would this Court approve third-party waiver of any other constitutional right? For instance, would it be possible for a guardian to waive an incompetent inmate's Eighth Amendment right against execution, either on the basis of prior statements by the inmate that he preferred death to life in prison or that it was somehow in the inmate's best interests to proceed with the execution? If the execution of incompetent inmates offends our societal mores, *Ford v. Wainwright*, 477 U.S. 399 (1986), why would it offend our societal mores less to cause the death of Nancy Cruzan? Respondents submit that it would be "ironic" if

the assumptions we so readily make about incompetent persons and how best to act in their best interests "were suddenly unavailable" in determining whether to withdraw life-sustaining treatment. Cf. *Thompson v. Oklahoma*, 108 S.Ct. 2687, 2693 n.23 (1988). Informing our judgment on this question should be the "virtue of consistency", for the very assumptions we make about incompetent persons when we legislate on their behalf tells us that it is likely to be in their best interests to require judicial oversight based upon objective factors established by clear and convincing evidence. *Id.*

To deviate from normal principles carries with it the substantial risk that governmental action will be "less and less restricted by an ordinary application of constitutional protections." Price and Burt, *supra* at 59. The ominous trend they predicted can be stemmed by the simple recognition that third-party consent, even when necessary, is an arbitrary fiction and "must always be narrowly circumscribed." *Id.* at 70. This is precisely what the Missouri Supreme Court sought to accomplish and respondents submit that neither the court's aim nor its method constitutes a denial of petitioners' constitutional rights.

III. THE DECISION OF THE MISSOURI SUPREME COURT DOES NOT DENY TO INCOMPETENT PERSONS THE EQUAL PROTECTION OF THE LAW.

In their final point, the petitioners make a brief and rather half-hearted argument that the decision of the Missouri Supreme Court fails to accord incompetent persons the equal protection of the law. Respondents submit that any equal protection analysis in this case must take

into account the "real and undeniable differences" between competent and incompetent persons. See *City of Cleburne v. Cleburne Living Center, supra*. Further, the foregoing discussion demonstrates that the choices made by the Missouri Supreme Court in developing a procedure to address this and similar questions is rationally related to these differences.

The essence of the Equal Protection Clause is that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202 (1982). However, this Court has previously recognized that the "handicapped typically are not similarly situated to the nonhandicapped." *Alexander v. Choate*, 469 U.S. 287, 298 (1985). The Equal Protection Clause does not require that that which is in fact different be treated in law as though they were the same. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966). There can be no doubt that persons such as Nancy Cruzan are not similarly situated to persons who are competent to make medical decisions on their own behalf. Any case involving the latter would clearly present vastly different legal issues should the state attempt to limit or override an individual's choice. But those differences in fact and law cannot be ignored when a case is presented involving an incompetent person. For instance, one of the distinguishing factors between the abortion decision by a pregnant minor and the commitment decision of a minor in *Parham* was the fact that the child in *Parham* was completely incompetent to make any such decision. *H.L. v. Matheson*, 450 U.S. 398, 450, n. 47 (1981)(Justices Marshall, Brennan and Blackmun dissenting).

In *City of Cleburne v. Cleburne Living Center, supra* at 442, this Court indicated that the mentally retarded are

not a quasi-suspect class. Respondents would submit that persons who are incompetent to make medical decisions on their own behalf are similarly not a quasi-suspect class. As a result, any equal protection argument must be judged by the rational basis test *Id.* at 446. The primary components of the procedure adopted by the Missouri Supreme Court are (1) its assignment of decision-making responsibility to the probate court, (2) the adoption of a clear and convincing evidence standard, (3) consideration of the specificity and knowledgeability of any prior statements of the now incompetent patient, and (4) a consideration whether the treatment at issue is or would be burdensome to the incompetent patient. Respondents submit that the foregoing discussion regarding these elements demonstrates that the Missouri Supreme Court's choice on each of these matters is a rational method of addressing the undeniable fact that a decision must be made *for* Nancy Cruzan and that there are competing interests at stake, including the conflicting rights of Nancy Cruzan herself. The standard cannot be whether the Constitution would tolerate similar procedures for a competent person which seems the essence of the petitioners' argument. Such reasoning is fallacious and based upon the uncritical assumption that the law pertaining to competent patients should be transferred to incompetent patients. Cf. *Bellotti v. Baird, supra* at 633. For these reasons, the decision of the Missouri Supreme Court does not violate the petitioners' right to equal protection of the law.

CONCLUSION

There is no doubt that cases of this nature present significant and sensitive issues. However, a court does not adequately address those issues by promoting legal fictions and distorting or ignoring accepted principles of law. To do so runs the risk of impacting upon medical treatment decisions, on behalf of incompetents, other than life-sustaining treatment. *Ruby v. Massey, supra,* (sterilization); *United States v. Charters,* 829 F.2d 479, modified 863 F.2d 302 (4th Cir. 1988) (psychotropic medication). The decision of the Missouri Supreme Court avoided these pitfalls, equitably balanced the competing interests and adopted procedures consistent with prior opinions of this Court. The decision below should be affirmed.

WILLIAM L. WEBSTER
Attorney General

ROBERT L. PRESSON *
Assistant Attorney General

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-8784

ROBERT NORTHCUTT
General Counsel
Missouri Department of Health
1738 E. Elm Street
Jefferson City, Missouri 65101

* Attorney of Record

Attorneys for Respondents
Harmon and Lamkins